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No. 88-1191

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERTO VERGARA-VELEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether government agents failed to comply with the knock-and-announce statute, 18 U.S.C. 3109, before entering petitioner's home.

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OPINION BELOW

The court of appeals' order (Pet. App. 1a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1988. The petition for a writ of certiorari was filed on December 24, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to distribute and possess cocaine, in

violation of 21 U.S.C. 846, and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to two concurrent eight-year terms of imprisonment followed by a five-year term of supervised release. C.A. App. A4. The court of appeals affirmed. Pet. App. 1a-3a.

1. Drug task force officers conducting an undercover drug trafficking investigation obtained a federal warrant to search petitioner's home. They arrived at petitioner's front door, identified themselves, and demanded entry, knocking and shouting "police" at least five or six times in a two or three minute period. A face appeared at a second story window, but no one answered the door. The officers then broke open the door, conducted a search, and found (in addition to petitioner, his companion, and their son) two kilograms of cocaine, a loaded .38 caliber revolver, and more than $5,000 in cash. The officers arrested petitioner and seized the cocaine. See C.A. App. A17-A25, A47-A48.

2. Petitioner moved to suppress the evidence, alleging that the officers failed to comply with the so-called "knock-and-announce" statute (18 U.S.C. 3109), which requires an officer to announce "his authority and purpose" before breaking open a door or window to execute a search warrant.[1] The district court held a hearing on the question and rejected petitioner's contention that the officers gave him insufficient time to respond before they entered. The court concluded that petitioner's failure to open the door, even after someone appeared in the

[1] Section 3109 states:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

upstairs window, justified the officers' forcible entry into the house. C.A. App. A115-A116.

Petitioner appealed his subsequent conviction solely on the ground that the district court erred in refusing to suppress the evidence for violation of the knock-and-announce statute. Employing a new argument on appeal, petitioner contended that the officers violated the statute because they failed to announce their purpose before entering. The court of appeals rejected that argument on the ground that petitioner did not raise that objection to the search at the suppression hearing. Pet. App. 2a. The court further concluded that the "entry was proper because the officers had been constructively refused entry by the time they broke in." *Ibid.*

ARGUMENT

Petitioner renews his assertions that the officers violated the knock-and-announce statute, arguing that he properly presented his contentions in the district court (Pet. 4) and that his failure to admit the officers did not constitute a constructive refusal to allow entry (*id.* at 5-6). These arguments find no support in the record and do not, in any event, merit this Court's review.

1. Petitioner first contends that he properly preserved his argument that the officers failed to announce their purpose. He observes that his motion to suppress evidence included an affidavit from his counsel alleging that the officers violated the knock-and-announce statute by failing "to announce their authority and purpose at the time of the execution of the search warrant" (Pet. App. 7a). This broad allegation, which simply tracks the language of the statute, may have encompassed petitioner's present objection that the officers failed to announce the reason for

their presence. But petitioner did not pursue that objection at the suppression hearing.

Petitioner argued, instead, that the officers violated the statute by failing to give the occupants sufficient time to respond to the officers' knocking (C.A. App. A101-A103, A113-A115), and that the entering officer should have had the warrant in his hands when he entered (*id.* at A99-A101, A107-A109). The district court rejected those arguments, stating:

> So, the real issue here is whether there is sufficient time to permit the defendant to open the door after there was a knocking and an announcement that the police were outside.
>
> I find that there was sufficient time. I also find that it's unnecessary for the officer to have a warrant in his hand at the time as long as he knew that the warrant had been executed.
>
> So, I have to deny your motion to suppress.

C.A. App. A115. Since petitioner did not argue that the officers failed to announce their purpose, the district court did not inquire into the matter or address that question in its ruling. The court of appeals properly concluded that under these circumstances petitioner "has waived the right to raise this argument" on appeal (Pet. App. 2a). See *United States* v. *Braunig*, 553 F.2d 777, 780 (2d Cir.), cert. denied, 431 U.S. 959 (1977).

2. Petitioner further contends, as he argued in both the lower courts, that the officers violated the knock-and-announce statute because they did not give petitioner sufficient time to respond. The lower court correctly rejected this essentially factual contention. As the district court explained, two or three minutes was more than sufficient time for petitioner or some other occupant of the house to open the door (C.A. App. A115-A116). Indeed, courts

have repeatedly upheld the validity of searches when the delay between announcement and entry was less than two minutes. See, *e.g.*, *United States* v. *Ruminer,* 786 F.2d 381, 383-384 (10th Cir. 1986); *United States* v. *Andrus,* 775 F.2d 825, 844 (7th Cir. 1985); *United States* v. *Noreikis,* 481 F.2d 1177, 1180-1181 (7th Cir. 1973); *United States* v. *Aldrete,* 414 F.2d 238, 239 (5th Cir. 1969); *Martin* v. *United States,* 341 F.2d 576 (5th Cir. 1965); *United States* v. *West,* 328 F.2d 16, 18 (2d Cir. 1964). Here, it was apparent that whoever was inside was not going to allow entry and that further delay would have served no purpose; indeed, it could have resulted in the destruction of evidence and "might have made the entry more dangerous." *United States* v. *West,* 328 F.2d at 18.[2]

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[2] The supervising officer testified at the suppression hearing that he reasonably believed that petitioner was armed and that, once the officers' knocking was ignored, immediate entry was necessary for their own safety. See C.A. App. A19, A22, A59-A60. Thus, even if the officers had failed to comply with Section 3109, the evidence seized would not have been suppressed, as any noncompliance would have been excused by exigent circumstances. See *Sabbath* v. *United States,* 391 U.S. 585, 591 & n.8 (1968); *United States* v. *Spinelli,* 848 F.2d 26, 28 (2d Cir. 1988); see also *Ker* v. *California,* 374 U.S. 23, 47 (1963) (Brennan, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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